

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE DEPARTMENT OF ADMINISTRATION**

IN THE MATTER OF:

OAH No. 05-0634-PER

L.N.

DECISION AND ORDER

I. Introduction

On October 14, 2005, a formal hearing was held to consider L.N.'s appeal of a decision by the Division of Retirements and Benefits (Division) to deny his request for a waiver of the deadline to file a request for occupational disability benefits from the Public Employees' Retirement System (PERS). L.N. appeared. The Division was represented by Assistant Attorney General Toby N. Steinberger. The hearing was audio-recorded. The record closed at the end of the hearing.

Having reviewed the record in this case and after due deliberation, I conclude that the Division's decision should be affirmed.

II. Facts

A. History

Mr. N. began employment with the Department of Transportation and Public Facilities (DOT), in May 1985. He was employed as a heavy equipment operator. His employer had concluded that his job required that he be able to frequently lift over 50 pounds and put this requirement in his position description. Mr. N. suffered a back injury on November 14, 2002, when he was lifting a tire off a tire machine. For the next two months, he was off work, receiving workers compensation.¹

On January 6, 2003, Mr. N.'s doctor, Dr. Joesse, released Mr. N. to return to work under the condition that his work was restricted. Dr. Joesse wrote that Mr. N. "should

¹ Recording of Hearing & Ex.1 & 2.
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avoid heavy lifting and twisting." According to Mr. N., Dr. Joesse advised him not to lift over 25 pounds.²

Mr. N.'s supervisor would not allow him to work under the conditions imposed by Dr. Joesse's limited release. Mr. N.'s supervisor informed him that he could not allow him to return to work unless Mr. N. was "100 percent."³

Frustrated because he wanted to work, Mr. N. returned to Dr. Joesse and requested a new release that would allow him to return to work without restrictions. Mr. N. explained that Dr. Joesse refused, informing Mr. N. that he would never be 100 percent. On June 30, 2003, Mr. N. terminated his employment with DOT and applied for early retirement benefits. On July 1, 2003, he was granted early retirement.⁴

Mr. N. continued to receive workers' compensation benefits for his injury. On May 27, 2004, almost a year after he retired, the Division of Workers' Compensation notified Mr. N. that it had approved his request for reemployment employment benefits, because Dr. Joesse had concluded that Mr. N. was not capable of performing the physical requirements of his DOT position.⁵

On January 20, 2005, over a year after the statutory deadline, Mr. N. applied for PERS occupational disability benefits. A friend had recently told him that he should apply.⁶

In a decision date January 26, 2005, the Division denied Mr. N.'s request to waive the deadline for his application for disability retirement benefits.⁷

Mr. N. appealed the Division's decision. Mr. N. argued that the deadline should not be applied in his case because the DOT did not provide him with the form to request disability retirement.⁸

² Recording of Hearing & Ex. 8.

³ Recording of Hearing.

⁴ Recording of Hearing & Ex. 1.

⁵ Recording of Hearing.

⁶ Recording of Hearing & Ex. 7.

⁷ Recording of Hearing & Ex. 9.

⁸ Recording of Hearing.

B. Findings

Based on the evidence in the record, I conclude that it is more likely than not that:

1. Mr. N. did not apply for disability retirement benefits until over a year had past since he retired from state service.
2. Mr. N. knew before he retired that he might be entitled to disability retirement benefits.
3. Mr. N. chose to apply for early regular retirement rather than disability retirement because he did not think his doctor would support his application for disability retirement and because he wanted to try to get re-training, paid for by workers' compensation.
4. Mr. N. was not mentally impaired by pain or pain medication when he decided to apply for early regular retirement rather than disability retirement.
5. Mr. N. was capable of timely filing for disability retirement benefits without assistance from his PERS employer or the Division.
6. There were no extraordinary circumstances that prevented Mr. N. from timely filing for disability retirement benefits.
7. At the time he filled out the paperwork to request early regular retirement, Mr. N. knew that he would have had to fill out different paperwork to request disability retirement.
8. Mr. N. was aware that he had not applied for disability retirement when he applied for early regular retirement.
9. Mr. N. did not rely on representations of his PERS employer or the Division in choosing not to timely file for disability retirement benefits.
10. Mr. N. would not have timely filed for disability retirement benefits even if he had been provided with the form.

III. Discussion

An employee must apply for disability retirement within 90 days after retiring.⁹ The apparent intent of the 90-day statutory deadline is to prevent employees from taking a "wait and see approach to deciding whether to apply for disability retirement" when it is not clear that their job-related injuries are disabling or that their disabilities are job-related. Disability retirement benefits are intended to compensate employees who must leave their state employment because of a job-related disability. The longer the period is between the date the employee leaves state

⁹ Alaska Statute 39.35.410(f).

service and applies for benefits, the more difficult it is likely to be for the Division to determine if the employee left state service due to a job related injury that was permanently disabling at the time the employee left state service. The statute requiring timely filing prevents evidence of the extent of the employee's disability at the time of his leaving state service, and the relationship of the disability to his employment, from being lost or obscured by subsequent injuries or illness.

There are only two ways that an employee who has missed the 90-day deadline may still be allowed to apply for disability retirement. The employee may receive a waiver of the deadline from the Division if extraordinary circumstances prevented the employee from timely the request,¹⁰ or the Division may be estopped from enforcing the deadline because the employee's reasonable reliance on a representation by the Division caused the late filing.¹¹

A. Waiver

The Division correctly denied Mr. N.'s request for a waiver of the deadline. The Division may grant a waiver only if the deadline was missed due to extraordinary circumstances.¹² Extraordinary circumstances include very unusual situations where an employee was prevented from filing due to circumstances beyond his control, such as when an employee was legally incompetent or in the hospital during the filing period.¹³ An employee's neglect, or lack of knowledge about the deadline, his eligibility, or how to get a form, is not an extraordinary circumstance that would excuse a late filing.¹⁴ Mr. N. missed the deadline because his discussions with his doctor convinced him that he would not qualify for disability retirement. These are not extraordinary circumstances. Mr. N. was not suffering from any mental disability and his judgment was not impaired by medication when he decided to file for early retirement and decided not to apply for disability retirement. He admitted at the hearing that, although he sometimes took pain medication, he was not on pain medication at the time he applied for early retirement. A waiver is not justified under the facts of this case.

¹⁰ Alaska Statute 39.35.410(f).

¹¹ *Crumm v. Stalnaker* 936 P 2d 1254 (Alaska 1997).

¹² Alaska Statute 39.35.410(f).

¹³ Alaska Regulation 2 A A C 35.100(d)

¹⁴ Alaska Regulation 2 A A C 35.100(d)

B. Estoppel

The Division is not estopped from enforcing the 90-day deadline. One of the elements of the defense of estoppel against the government is that the individual asserting that defense missed a deadline because the individual relied on representations made that governmental body.¹⁵ Mr. N. missed the deadline because he decided to apply for early retirement and not to apply for disability retirement after he spoke with his doctor. The defense of estoppel does not apply under the facts of this case.

However, because the Division made arguments in its brief, which could mislead those who review this case as precedent for action in other cases, or in setting policy to ensure that employees receive adequate notice of their right to apply for disability retirement and notice of the 90-day deadline, it is appropriate that these arguments be addressed in more detail.

1. Statutory Waiver Does Not Preclude Defense of Estoppel.

In its brief, the Division incorrectly argues the Division cannot be estopped from enforcing the deadline because a statute allows for waiver of the deadline. A legal remedy precludes an equitable one only if the legal remedy would provide adequate relief to the party seeking the relief.¹⁶ The Division argues that the enactment of the statute providing the authority to waive the deadline was intended to modify the common law doctrine of estoppel as applied to PERS. Estoppel and waiver are two separate remedies. Each applies in different circumstances. Estoppel requires reliance on a representation made by the Division. The statutory waiver does not. The waiver provisions grant statutory authority, which *allows* the Division to relax the deadline if extraordinary circumstances prevent the employee's timely filing. As the Division notes, this provision usually applies when an employee suffers from an unusual disability that prevents timely filing.

In contrast, the doctrine equitable estoppel would bar the Division from enforcing the deadline if the employee missed the deadline because of reasonable reliance on representations made by the Division, or possibly an agent of the Division, under circumstance that would make strict enforcement unjust. This doctrine applies when the Division, through an act or

¹⁵ *Crumm v. Stalnaker* 936 P 2d 1254 (Alaska 1997).

¹⁶ "One who seeks the interposition of equity must generally show that he either has no remedy at law or that no legal remedy is adequate." *Peter v. Progressive Corp.* 2006 WL 438658, *7 (Alaska 2006) & *Knaebel v. Heiner* 663 P.2d 551, (Alaska 1983).

communication, has misled the employee. The circumstances that cause this misunderstanding may or may not be extraordinary. They might well be quite ordinary, and even the natural consequence of the Division's standard operating procedures, as they were in the case of *Crumm v. Stalnak*.¹⁷

In *Crumm v. Stalnak*, a Teachers' Retirement System (TERS) case, the Alaska Supreme court held that the TERS was estopped from enforcing a deadline because the retirement paperwork package sent to Mr. Crumm, reviewed as a whole, and taking into account the fact that it did not provide a separate application for a specific benefit, gave Mr. Stalnak the understanding that he did not have to apply for that benefit to receive it. The court set out the elements of estoppel as follows:

Estoppel may apply against the government and in favor of a private party if four elements are present: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.¹⁸

The language of the statute and the elements of estoppel do not support the Division's argument that statutory standards for waiver of the deadline were intended to replace these elements. A grant of discretion to waive the deadline under extraordinary circumstances does not imply that this discretion is intended to be a substitute for an equitable bar to enforcing the deadline if the elements of estoppel are met. Because the statutory waiver and the equitable defense of estoppel provide relief in different circumstance, the statutory waiver does not preclude the defense of estoppel.

2. Representations of PERS Employers Could Lead to Estoppel

The Division also argues that the doctrine of equitable estoppel does not apply to enforcement of the deadline when state personnel officers rather than the Division made the representations that the employee relied on.

It is not at all clear that the Division could not be estopped from enforcing the deadline based on an employee's reasonable reliance on a representation by a PERS employer's personnel staff. The Division might be estopped if the representation was made under circumstances that

¹⁷ *Crumm v. Stalnak*, 936 P 2d 1254, 1257, (Alaska 1997).

¹⁸ *Crumm v. Stalnak*, 936 P 2d 1254, 1256, (Alaska 1997).

made it reasonable to assume that the staff was acting as an agent for PERS.¹⁹ The authority cited by the Division as authority for its argument that PERS cannot be estopped based on representations of state employees, whose duties include providing advice to other employees on personnel matters, are not cases in which that issue was being decided.²⁰

3. Division Not Estopped in Mr. N.'s Case

In Mr. N.'s case there is no need to decide whether the Division could be estopped if because of representations or actions of DOT personnel staff. The DOT staff's actions and representations did not cause his untimely filing. Mr. N. admitted that he knew he had the right to apply for these benefits. He decided not to after he discussed the matter with his doctor.

Mr. N. was in a difficult position at the time that he retired. His employer would not permit him to return to work. He believed that he could not afford not to retire from state service, and he hoped that he would eventually be able to go back to some kind of work through physical therapy and retraining. At that time, Mr. N.'s decision to take early regular retirement was consistent with his understanding of his medical status. He did not think he was disabled. His doctor had told him that he was not disabled and had indicated that he (the doctor) would not support Mr. N. if he applied for disability retirement. Mr. N. planned to continue his attempt to seek rehabilitation and retraining. Mr. N. does not appear to have been specifically aware of fact that that applying for retirement would cause the 90-day time limit for applying for disability retirement benefits to start the running, but he was aware that he was making a choice between applying for early and disability retirement benefits.

In making this choice, Mr. N. relied only on his doctor's advice and his own judgment. Given Mr. N.'s admitted state of mind after he spoke with his doctor, even if DOT personnel staff had provided Mr. N. with a disability retirement application, he probably would have done just what he did, apply for early regular retirement. He would not

¹⁹ See for example, the discussions of the doctrines of apparent agency and agency by estoppel in *Jackson v. Power* 743 P.2d 1376 (Alaska, 1987).

²⁰ See Division's Brief, page 3. Rather than rely on the dubious protection of such precedent, the Division might want to advise all PERS employers to provide written notice of the deadline and the need to contact a PERS representative, to any employee who applies for retirement when he is on worker's compensation. A court might find it disturbing that a PERS employee could retire while receiving worker's compensation without either having received detailed counseling about the right to apply for disability retirement benefits or having waived an offer to receive such counseling in writing.

have applied for disability retirement until long after the deadline, when he had completed his physical therapy and his retraining and his workers' compensation claim had been settled.

Mr. N. asserts that the reason he did not apply for disability retirement is that DOT personnel staff did not provide him with a form when he requested it and indicated that he should talk to his doctor when he asked about applying for disability retirement. Mr. N. asserts that DOT personnel staff's failure to provide this form and their steering him toward his doctor, set in motion the chain of events that led to his late filing, because instead of filling out the form and sending it in, he first went to his doctor, who discouraged him from applying.

The weak link in Mr. N.'s argument is the assumption that Mr. N. would have filed for disability retirement if he had been given the form. The evidence in the record does not support this assumption. Mr. N. would almost certainly have talked to his doctor before he filed for disability retirement and his doctor would have discouraged him from doing so.

Mr. N.'s situation is easily distinguishable from the circumstances that resulted in a finding of estoppel in the *Crumm* case. The failure to include the form to request unused sick leave credit in the retirement paperwork sent to Mr. Crumm was just one of several factors that made it reasonable, after reviewing that paperwork, for Mr. Crumm to believe that his retirement benefit would automatically be calculated to include his unused sick leave without Mr. Crumm having to file a separate request to receive credit for his unused sick leave.

In Mr. Crumm's case, the court concluded that the retirement paperwork, taken as a whole, was a representation by the TERS Division that Mr. Crumm did not need to file a separate request to get credit for his unused sick leave. In Mr. N.'s case, he knew that he had to file a different form to apply for disability retirement and he knew that he could have obtained that form directly from the Division. Unfortunately, before he did so, he was discouraged by his conversation with his doctor and decided to apply for early regular retirement instead. There was no representation, other than his doctor's, made to Mr. N. that he relied on in deciding to apply for early retirement and not apply for disability retirement.²¹

Mr. N. knew that he would have had to file for disability retirement. The fact that there is a filing required implies that there is a deadline for that filing. It was Mr. N.'s

²¹ At the hearing, the Division explained that an individual could apply for both early retirement and disability retirement at the same time, which allows the employee to receive early retirement benefits while his disability retirement claim is being processed.

responsibility to ask about the deadline for filing and to file before it passed.

IV. Conclusion

The Division correctly declined to waive the 90-day deadline in Mr. N.'s case. Mr. N. did not show that extraordinary circumstances prevented him from filing until a year after the deadline. The Division is not estopped from enforcing the 90-day deadline in Mr. N.'s case. Mr. N. chose not to apply for occupational disability retirement before the deadline based on his own assessment of his best interests, not in reasonable reliance on any representations made by the Division or his employer.

V. Order

The decision of the Division issued on January 26, 2005, which denied Mr. N.'s request to waive the deadline for his application for disability retirement benefits, is AFFIRMED

VI. Notice

This Order concerning the appeal of L.N. is issued under the authority of AS 39.35.006, and is a final administrative order for purposes of appeal to the Superior Court.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the date of this decision. The motion must state specific grounds for relief, and, if mailed, be addressed: Office of Administrative Hearings, P.O. Box 110231, Juneau, Alaska 99811-0231.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 39.35.006 within 30 days of the date of this decision.

DATED this 23rd day of March, 2006.

By: Mark T. Handley
Administrative Law Judge

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Case Parties
3/23/06